

**And then, after all of the federal
questions are settled . . .**

**Health Court Models
under
State Constitutions**

With additional observations
on administrative law and
consensual demonstration
projects.

The take-aways:

Administrative health courts are likely to be challenged nearly anywhere.

If properly designed, they can survive challenge in most of the states.

Each state must be examined alone – variations are legion and cannot be predicted from the texts.

Strong empirical support may be essential.

State Constitutional Provisions

- Equal Protection (No Special Legislation)
- Separation of Powers (No Delegation)
- Due Process (Procedural)
- Due Process (Substantive)
- Trial by Jury
- Open Courts
- Right to Remedies
- “Single Subject” and Miscellany

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"No person shall be deprived of life, liberty, or property without due process of law."

State Constitutional Provisions

- Equal Protection (Equal Protection)
- Separation of Powers (Separation)
- Due Process (Procedural)
- Due Process (Substantive)
- Trial by Jury
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"The right of Trial by Jury as heretofore enjoyed shall remain inviolate."

State Constitutional Provisions

“ . . . courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character.”

- No Special Legislation
- No Delegation
- Procedural
- Due Process (Substantive)
- Trial by Jury
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State Constitutional Provisions

- Equal Protection
- Separation of Powers
- Due Process

“Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character. . . .”

- Due Process (Substantive)
- Trial by Jury
- Open Courts
- **Right to Remedies**
- “Single Subject” and Miscellany

Jury Trial, Open Courts, and Remedies

1. Does the right apply to this cause of action?

Could depend on date of Constitution.

Jury Trial, Open Courts, and Remedies

2. If the provision does apply, may the legislature abrogate or limit the cause of action or remedy?

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YES

Legislature can abrogate common law rights and can therefore alter or condition the remedies. (Example: Holding that “Open Courts” clauses address the Judiciary, not the legislature.) But, the legislative action must satisfy other Constitutional standards. (Equal protection, due process . . .)

Jury Trial, Open Courts, and Remedies

2. If the provision does apply, may the legislature abrogate or limit the cause of action or remedy?

NO, but

Common law rights are never “frozen,” but legislatures are limited . . .

Most common limitation: “Quid pro quo.”

An adequate substitute remedy and / or an imperative public need with no other practical alternative.

How these ideas are tied together . . .

An example:

“A legislature can modify the right to a jury trial . . . but modification of the common law must meet due process requirements and be reasonably necessary in the public interest . . . Due process requires that the legislature substitute [a] statutory remedy to replace the loss of the right.”

-- *i.e.*, the “quid pro quo”

How much “quid” do you need?

It depends:

- a. In some states, none – due process means only a rational and non-arbitrary response to a proper state objective.
- b. Adequate benefits to society in general.
- c. Adequate benefits to the affected group.
- d. Adequate benefit to a plaintiff like this one.

So how much is “adequate”?

It depends:

States with identical Constitutional texts, facing similar legislative actions, can reach widely different conclusions.

An example – the “caps” experience:

CLAIM	Noneconomic Damages Cap		Total Damages Cap	
	Upheld	Overtured	Upheld	Overtured
Access to Courts <i>10 of 14 upheld.</i>	AK, FL, KS, MO, UT, WV	FL	ID, IN, LA, NE	KS, SD, TX
Right to Jury Trial <i>16 of 21 upheld.</i>	AK, CA, FL, ID, KS, MD, MI, MO, UT, WV, WI	AL, OH, OR	CO, IN, LA, NE, VA	AL, KS, SD
Equal Protection <i>15 of 22 upheld</i>	AK, CA, FL, MI, MO, OH, UT, WI, WV	AL, NH	CO, ID, IN, LA, NE, VA	AL, IL, ND, SD, TX
Due Process <i>16 of 19 upheld.</i>	AK, CA, CO, FL, MD, MO, UT, WV, WI	OH	CO, ID, IN, LA, NE, TX, VA	ND, SD
Separation of Powers <i>7 of 7 upheld.</i>	AK, ID, IL, UT, WV	--	NE, VA	--

From C. Kelly & M. Mello, "Are Medical Malpractice Damages Caps Constitutional? An Overview of State Legislation" (2005) Table 2:

Experience of Reforms Other Than Caps

Non-random sample of post '85 cases.

1. General Overview

Reform	Total Number	Number Approved	Number Nullified	% Nullified
Periodic Payment	8	3	5	63%
Statute of Limitations	27	15	12	44%
Statute of Repose	18	11	7	39%
All Other	13	8	5	38%
Joint & Several Liability	10	7	3	30%
Expert Pre-trial Affidavit	7	5	2	29%
Collateral Source	11	8	3	27%
Pre-trial Mediation or Arbitration	8	6	2	25%
Expert Credentials	5	4	1	20%
Pre-trial Screening Panel	19	16	3	16%
All Reforms	126	83	43	34%

	Challenge	Total Number	Number Approved	Number Nullified	% Nullified
	Delegation of Powers	4	2	2	50%
	All Other	10	6	4	40%
	Open Courts	31	21	10	32%
	Equal Protection	64	46	18	28%
	Right to Jury Trial	24	18	6	25%
	Due Process - Substantive	13	10	3	23%
	Special Legislation	11	9	2	18%
	Separation of Powers	15	13	2	13%
	Due Process - Procedural	30	27	3	10%
	One Subject per Title	3	3	0	0%
	All challenges	205	155	50	24%

Experience of Reforms Other Than Caps

Non-random sample of post '85 cases.

1. General Overview
2. Is anything predictable?

Looking for Consistency . . .

Of 23 states with multiple challenge cases:

10 validated everything

1 invalidated everything

13 had “split” outcomes

14 states had reported challenges to caps and separately challenges to other med mal reforms:

Of 12 that validated caps, 11 validated other reforms.

Of 3 that invalidated caps (yes, I know that $12+3 \neq 14$), 2 invalidated other reforms.

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Analyzing the “split” states:

Four invalidated statutes of limitations particularly affecting claims by minors, most on equal protection grounds.

Three invalidated previously acceptable reforms on “as applied” grounds, typically under open courts.

Two may be attributable to the environment – in one, Supreme Court judges are elected.

Two are OK with everything except reforms that limit traditional judicial functions.

Two remain enigmas.

Experience of Reforms Other Than Caps

Non-random sample of post '85 cases.

1. General Overview
2. Is anything predictable?
3. Other observations

Qualitative (a/k/a/ Subjective) Analysis

Decisions Upholding Reforms

Articulated deference to the legislature

Sound background data re existence of the problem

Sound theory and data linking this solution to the problem

Decisions Invalidating Reforms

Reducing historical function of the jury (higher scrutiny)

Affecting historical judicial functions, or affecting the course of trial

Compromising judicial authority

Barring access *de facto*

Inadequate *quid pro quo*

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But the BIG change in health courts . . .

No Jury / Expert decision-makers

Exclusivity

Deferential judicial review

Reference to external standards

Limited “matrix” damages



Again, how much quid is “adequate”?

Lessons from
Workers' Compensation
and
Automobile No-Fault

- **Restrict remedies but (QPQ) eliminate significant defenses / remove negligence as the predicate basis of recovery.**
- **Recitation of a well-documented problem.**
- **Common law rights can be abolished; legislature can condition *new* statutory rights.**
- **Treat like injuries alike even if they have different names.**
- **Guidelines should be *guidelines* and from objective sources.**
- **Caveat: Some states needed WC amendments to Constitutions.**

Workers' Compensation
and
Automobile No-Fault

A

ate”?

OK to trade “prompt and sure recovery” [of minor losses] for “delayed and uncertain” award in court.

No-fault reparation OK even if plaintiff pays for the mandatory insurance.

And remember Florida: advantages of arbitration sufficient QPQ for limitation of damages.

and

Automobile No-Fault

Again, how much quid is “adequate”?

Would a change from negligence to “avoidable harm” be sufficient?

Would shortened time frames and security of recovering a judgment help?

Would more accessible procedures add enough to the bargain?

Notes on consent-based demonstration projects

1. Jury trial waivers
2. Arbitration statutes in the states
3. Administrative Procedure Acts under State Constitutions

JURY TRIAL WAIVERS

All of the usual rules of unconscionability, other state law.

Plus, “Voluntary, knowing and intelligently made.” “Must be clearly and explicitly stated; can never be implied.”

“Knowing” – cases on personal loan guarantees stress business experience and access to counsel.

“Clarity” standard is beyond the ordinary – “conspicuous”
Each case is tested on its merits.

“Presumption is against finding a waiver, and the clauses are to be narrowly construed.” “Junk mail won’t do.”

CA – probably not possible. KY – WC allows an “opt-out.”

Quaere – a “safe harbor” statute? (TX WC opt-in)

EXISTING ANTI-ARBITRATION STATUTES: Healthcare, General Consumer, Personal Injury

20 States: AL, AK, AR, CA, CO, GA, IL, IN, KS, LA,
MT, NE, NM, OH, SC, SD, TX, UT, VT, VA

Typical: Invalid if signed pre-dispute.
Cannot be condition of service.
Right to rescind after 90 (60, 30) days.

Are these statutes valid? *Nexion (TX) vs. Allen (CO)*

Import: Is a health court “consensual” demo more like a state administrative agency, or more like private arbitration?

Limitations on Administrative Agencies

In addition to the threshold issues of “quid pro quo” and other constitutional requisites:

Who decides . . . State ALJ? Role of neutral experts?

Procedural due process . . . Party experts?

Appeal from adverse decisions . . . To what court?

On what grounds? (fact, law)

With what standard of review (clear error?
abuse of discretion? Substantial evidence?)

Where to look: WC again; state APA.

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